Lampi, L. L. C. *and* International Brotherhood of Electrical Workers, Local 558 *and* Lomas West.
Lampi, L. L. C. *and* International Brotherhood of Electrical Workers, Local 558, Petitioner. Cases 10–CA–28174, 10–CA–28967, and 10–RC–14568

November 13, 1996

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On May 22, 1996, Administrative Law Judge Albert A. Metz issued the attached decision.[1] The Respondent filed exceptions and a supporting brief, and the Charging Party Union filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

The judge found, and we agree, that the Respondent violated the Act and interfered with the election by granting the unit employees a wage increase shortly before the election. Although we agree with the judge's conclusion and his findings of facts, we rely on the reasons stated below in finding that the wage increase was unlawful and objectionable.

The Board set out the following standard in *United Airlines Services Corp.*, 290 NLRB 954 (1988), for determining whether conduct involving the grant of benefits is objectionable:[4]

> It is well established that the mere grant of benefits during the critical period is not, per se, grounds for setting aside an election. Rather, the critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). As a general rule, an employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene. *R. Dalkin,* supra, quoting *Red Express*, 268 NLRB 1154, 1155 (1984). In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than a pending election, for the timing of the grant or announcement of such benefits. *Uarco Inc.*, 216 NLRB 1, 2 (1974). See, e.g., *Singer Co.*, 199 NLRB 1195 (1972).

The facts show that the Respondent has an established practice of granting its employees a wage increase in January of each year. Yet, contrary to this practice, the Respondent told employees in group meetings after the Union had filed its election petition that there would be no wage increase that year. Then, a few days before the January 12, 1995 election, the Respondent reversed its decision and announced that employees would receive a wage increase of 47 cents per hour, more than 3 times the amount they had received in 1994. The Respondent's bulletin board announcement of this raise highlighted the amount in larger type than the rest of the lettering, and the Respondent also made a slide presentation to its employees detailing the wage increase they would receive.

As stated, the grant of a wage increase during the pendency of an election constitutes both an unfair labor practice and objectionable conduct unless the Respondent can justify the timing of its action. We find that the Respondent has not rebutted the inference of unlawful motivation in this case. The Respondent argues that it granted the increase at a time consistent with its past grant of wage increases and for specified legitimate business reasons. This argument, however, ignores the uncontradicted employee testimony that,

[1] The judge subsequently issued an erratum on June 7, 1996.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In adopting the judge's finding that the table leaders are not statutory supervisors, we note that the Respondent's reliance on, inter alia, *Superior Bakery*, 294 NLRB 256 (1989), enfd. 893 F.2d 493 (2d Cir. 1989), for a contrary result is misplaced. In the present case the evidence shows that the table leaders spend most of the workday performing unit work and that management, which made an independent evaluation of problems reported by the table leaders, did not necessarily follow their recommendations concerning employee discipline. Further, the table leaders did not do writeups of employees. In *Superior Bakery*, by contrast, the foreman whom the Board found to be a statutory supervisor spent the majority of his time observing and overseeing other employees; issued verbal warnings, which were the first step in the disciplinary system; and issued at least one written warning without consulting with higher management. The foreman, in contrast to the table leaders, wrote out written warnings, countersigned by a superior (such countersigning was company policy, even for those warnings issued by admitted supervisors), and as many as 80 percent of the foreman's recommendations regarding warnings were adopted and signed by higher management. Thus, contrary to the Respondent's argument, we find that this case is distinguishable on the facts from *Superior Bakery*.

[4] The same test is applied in unfair labor practice cases. See *Holly Farms Corp.*, 311 NLRB 273, 274 (1993); *Speco Corp.*, 298 NLRB 439 fn. 2 (1990).

before the election, the Respondent had indicated to the employees that it could not afford wage increases that year, inter alia, because it had just built a warehouse. Then, suddenly, the Respondent granted an increase and, when the larger-than-usual increase was announced, it was accompanied by a bulletin board announcement highlighting the amount of the raise and by a slide presentation. The Respondent has not shown that earlier, smaller wage increases were trumpeted in such a fashion. We conclude that the Respondent's sudden change in position here from giving employees no raise to giving them one substantially larger than it had conferred in 1994 is a classic example of the "fist inside the velvet glove" approach to labor relations that the Supreme Court prohibited in *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). We also note that the Respondent's preelection wage increase did not occur in a context free from other unfair labor practices in that the Respondent also coercively interrogated employees and unlawfully maintained a rule prohibiting employees from discussing their wages among themselves.

Regarding the Respondent's prohibition against employees' discussing their wages, we note that this unfair labor practice that affected the entire bargaining unit could constitute an additional ground for setting aside the election under *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988), even though the Petitioner did not specifically allege the conduct as objectionable. The Petitioner, however, has not excepted to the judge's failure to find that this Section 8(a)(1) violation also constituted election interference. In the absence of exceptions, we also do not rely on the Respondent's maintenance of that rule as an independent ground for setting aside the election. Nevertheless, we stress that the Respondent's prohibition on wage discussions rendered the pay increase all the more pernicious because it reinforced the notion of the total control over remuneration by the Employer, a "source of benefit . . . from which future benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co.*, supra, 375 U.S. at 409. For all these reasons, we adopt the judge's finding that the Respondent's preelection wage increase was an unfair labor practice and tainted the election results, and we shall direct a second election.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Lampi, L. L. C., Huntsville, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FUTHER ORDERED that the election held January 12, 1995, in Case 10–RC–14568, is set aside and that this case is severed and remanded to the Regional Director for Region 10 for the purpose of conducting a new election.

[Direction of Second Election omitted from publication.]

Karen N. Neilsen, Esq., for the General Counsel.
John A. Wilmer and *Kimberly C. Page, Esqs. (Wilmer & Shepard, P.A.)*, of Huntsville, Alabama, for the Respondent.
John L. Quinn and *Graham L. Sisson Jr., Esqs. (Nakamura & Quinn)*, of Birmingham, Alabama, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

ALBERT A. METZ, Administrative Law Judge. This case was heard at Huntsville, Alabama, on March 13–15, 1996. The International Brotherhood of Electrical Workers, Local 558 (the Union) and Lomas West (West),[1] an individual, have charged that Lampi, L.L.C.[2] (the Respondent) has violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act). Specifically it is alleged that the Respondent violated Section 8(a)(1) of the Act by maintaining an unlawful rule against discussing wages, acts of interrogating employees about their union activities, and granting employees wage increases to influence their vote in the election. Respondent is also charged with violating Section 8(a)(1) and (3) of the Act by disciplining Alice Sullivan and discharging Lomas West.

Additionally, the Union filed a petition for a representation election in a unit of Respondent's production and maintenance employees. An election was held on January 12, 1995,[3] which the Union lost. The Union subsequently filed objections to the election. By order dated May 26 the Acting Regional Director ordered that two objections to the election be consolidated for hearing with the unfair labor practice case.

II. JURISDICTION

The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent denies that the Union is a labor organization within the meaning of the Act. The record as a whole shows that the Union is an organization in which employees participate and which exists, at least in part, for the purpose of dealing with employers concerning labor disputes or conditions of work. I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Respondent operates a facility in Huntsville, Alabama, where it is engaged in the manufacturing of light fixtures. The Respondent's supervisory hierarchy at the material times was composed of Vice President/General Manager Heike

[1] West's name appears as amended at the hearing.
[2] The Respondent's name appears as amended at the hearing.
[3] All subsequent dates refer to the time period of September 1994 through August 1995 unless otherwise specified.

Holderer, Operations Manager Morris Overbeck, and Production Manager Gene Targonski.

The Union commenced an organizational campaign in the fall of 1994. Employees classified as table leaders were ultimately excluded from the production and maintenance unit by the parties' Stipulated Election Agreement.

III. RULE AGAINST WAGE DISCUSSIONS

The Respondent concedes that its employee handbooks contain a rule against discussing pay. This rule states in pertinent part:

> The amount of your pay is a confidential matter between you and the company, and is disclosed only to government taxing units as required by law. Your pay is not to be discussed among fellow employees. This discussion could result in immediate dismissal.

Karin Davis testified that as a former supervisor of the night shift she was required to enforce the rule. In addition she was told on one occasion by her supervisor that she could be written up for talking about her wages. The uncontroverted record shows that one employee, Jennifer Mitchell, was discharged for violating the rule. (Mitchell's discharge has not been litigated as part of this case.) I find that the rule is a violation of Section 8(a)(1) of the Act. *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992).

IV. INTERROGATIONS

A. *Attorney Wilmer's Meetings with Table Leaders*

In December and January the Respondent's attorney, John A. Wilmer, was at the Respondent's plant regarding the union campaign. He admittedly had several conversations with table leaders. The Respondent contends the table leaders were supervisory employees and they were excluded from the voting unit. The Government contends the table leaders are not supervisors and that Wilmer's conversations with them were unlawful interrogations about union sympathies.

1. Table leaders' duties

The 5 table leaders had 11 employees at their tables where lighting fixtures were assembled as a team. The leaders were responsible for making production quotas and getting to work slightly early to make sure that materials were available for the employees. They would also attend monthly meetings with their supervisor, Virgie McKenzie. The table leaders would reassign employees at their tables to do different tasks if an absence required filling in at that task.

The table leaders did not have the authority to hire, fire, promote, suspend, discipline, lay off, recall, promote, permit employees to take time off, or reward employees. They would report problems such as tardiness, attendance, drinking, fighting, and profanity to McKenzie. She would make an independent evaluation of the situation. The table leaders' recommendations were not always followed. Table leaders would not do writeups of employees.

A supervisor may consult with a table leader about employee appraisals in order to get her opinion of the employee's work. The supervisor would then complete the appraisal based on that opinion and the supervisor's observations of the employee's performance. Table leaders were paid a higher hourly and bonus rate than other employees on the tables. The leaders received the same benefits as other employees.

2. Analysis of table leaders' supervisory status

Section 2(11) of the Act defines a supervisor as:

> . . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Supreme Court has noted that Congress differentiated between supervisors who were empowered with "genuine management prerogatives," and "straw bosses, lead men, and set-up men" who are protected by the Act "even though they perform "minor supervisory duties." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280–281 (1974). See also *NLRB v. Dickerson-Chapman*, 964 F.2d 493, 497 (5th Cir. 1992) ("An employee's specific job title and station in the organization are not automatically controlling. The employee's *actual* authority and responsibility determine whether he is a supervisor." Emphasis in the original). *Security Guard Service*, 384 F.2d 143 (5th Cir. 1967); *Mack's Supermarkets*, 288 NLRB 1082, 1084 (1988). The burden of proof is on the party asserting supervisory status. *Health Care Corp.*, 306 NLRB 63 fn. 1 (1992).

In sum, the table leaders' duties and authority were shown to be no more than routine direction and assistance in relation to the other employees. They did not have the authority to do most supervisory functions set forth in the Act. Their direction of work was routine occasional reassignments. Their recommendations of discipline are not final but independently investigated by higher supervision. Their authority and influence in making recommendations were demonstrated to be extremely limited and subject to the close scrutiny and final authority of McKenzie. Based on the record as a whole, the Respondent has failed to meet its burden of proving that the table leaders are supervisors within the meaning of Section 2(11) of the Act. I find that the table leaders are not supervisors as defined in the Act, but rather they are "employees" as defined in Section 2(3) of the Act.

3. Interrogation of table leaders

Three former table leaders, Connie Ikard, Antonia Woods, and Theresa Stevens related meetings they had with Respondent's attorney, John Wilmer, during the preelection period. In sum, they testified that Wilmer asked them about the employees' union sympathies and the issues that caused the employees to consider union representation. Stephens and Woods testified that Wilmer asked their opinions of the Union. Woods recalled Wilmer wanting to know from her if she knew who started the union organizing drive. The meetings were held in an office with only Wilmer and the individual table leader present. The women were directed to the meetings by their supervisor and told they had to meet with Wilmer.

As corroboration of the table leaders' versions of their meetings with Wilmer, the Government elicited testimony

from former supervisor, Karin Davis. She testified that she also was similarly interviewed by Wilmer. He held a list of employees' names and wanted to know about the sex, race, and union sympathies of the employees on the list.

Wilmer denied having any specific conversations with Davis about the Union's campaign.[4] He did admit meeting with the table leaders. Wilmer stated that he believed the table leaders were supervisors within the meaning of the Act. He based that belief on his assessment of their duties and the fact that they were excluded from the unit by the Stipulated Election Agreement. Wilmer denied asking the women about their views of the Union or the union sympathies of other employees.

4. Analysis of the table leaders' interrogation

The Respondent made a calculated decision that table leaders were supervisors within the meaning of the Act. An error in that assessment does not excuse unlawful conduct. The demeanor of the table leaders and Supervisor Davis was convincing. They all testified in a straightforward and spontaneous manner. Wilmer was less convincing in his denials. I credit the table leaders and Davis as to what occurred in Wilmer's meetings with them. I find that Wilmer did ask the table leaders about their own and fellow employees' union sympathies and which employees started the union movement. Under all the circumstances the Respondent is found to have violated Section 8(a)(1) of the Act by Wilmer's interrogation of the table leaders.

B. *Supervisor Targonski's Conversation with Employee Woods*

In the fall of 1994, Antonia Woods was employed by the Respondent as a table leader. Woods testified that in this time frame she was called into Production Manager Gene Targonski's office where they had a conversation. She recalled Targonski asked her if she knew about the Union. She acknowledged she did. He asked Woods if she knew who had gotten it started. She told him she did. Targonski asked Woods who that was and she told him she could not tell him.

Targonski asked what Woods thought was going to happen, and she replied she hoped the Union got in this time. Targonski also asked her where the union meetings were being held. Woods asked Targonski if he did not know already. Targonski said he did not. Woods told him she could not tell him if he did not know.

Targonski testified that he did not "recall" any such conversation with Woods.

Woods was very specific in her recollection of this encounter. Her demeanor was that of a person who was reporting accurately what she had observed without embellishment. In contrast, Targonski's demeanor was not convincing when he testified that he did not recall the conversation. I find that the Respondent did violate Section 8(a)(1) of the Act when Targonski interrogated Woods about her union sympathies and the employees' union activities.

C. *Supervisor Overbeck's Conversation with Employee Connie Neely*

It is alleged that in January 1995 Respondent's Operations Manager Morris Overbeck unlawfully interrogated employee Connie Neely concerning union activities. The Respondent admits a conversation did occur between these individuals but denies any unlawful interrogation took place.

Neely is still employed by the Respondent as an assembler. In January she had suffered an on-the-job injury and was in a doctor's office awaiting treatment. Overbeck had brought another injured employee to the doctor's office and he and Neely had a conversation.

Neely testified that Overbeck asked her about the meetings the Company was holding concerning the Union. He wanted to know if the meetings were going okay. Neely told him they were going okay and the employees were learning some things from the meetings. Overbeck said that he knew that the union matter was all about money. Neely disagreed and told him she thought it was mostly about the way people were being treated and the working conditions. Neely recalled that Overbeck then asked her if she was for the Union. She told him she was not.

Overbeck remembered the encounter with Neely differently. He recalled he was reading a book while he waited to transport the injured employee he had brought to the doctor's office. He recognized Neely as an employee from the plant and asked what she was doing there. She showed him her injury and sat down. Overbeck commented to her about a child that was in the room reminding him of his granddaughter. He then returned to reading his book and soon the employee he was waiting for returned and Overbeck left. Overbeck did not directly deny Neely's testimony that he asked her about her union sympathies.

Neely was a straightforward witness who seemed sure of her recollection. Her demeanor while testifying impressed me as a sincere and accurate recitation of what she recalled being said. Neely is still employed by the Respondent. As a current employee it was against her self interest to testify contrary to her employer's position. She had no apparent stake in the outcome of the case. The Board and Courts recognize these as factors to be considered in assessing credibility. *NLRB v. Flexsteel Industries*, 83 F.3d 419 (5th Cir. 1996); *Stanford Realty Associates*, 306 NLRB 1061, 1064 (1992). Overbeck was less impressive in his demeanor when explaining his recollection of the conversation. Additionally, his lack of a direct denial of the interrogation is troubling. Balancing the two versions I credit the testimony of Neely as to what was said. Under all the circumstances I find that Overbeck's questioning of Neely about her union sympathies is a violation of Section 8(a)(1) of the Act.

V. THE PREELECTION WAGE INCREASE

A. *Background of Employee Pay Raises*

The Respondent gave a 47-cent general wage increase to employees effective January 1, 1995. The Government alleges the increase was designed to influence the employees' votes in the January 12 election. The same issue was set forth as objectionable conduct effecting the results of the

[4] Wilmer's testimony was received over the objections of Respondent's counsel who cited the impropriety of trial counsel testifying. The Board has declined to rule on the ethical propriety of the trial attorney testifying in a Board hearing where his testimony is otherwise relevant and competent. *Page Litho*, 311 NLRB 881 fn. 1 (1993); *Wells Fargo Armored Service Corp.*, 290 NLRB 872, 873 fn. 3 (1988).

election. The Respondent argues that the raise was awarded in the normal course of business and did not constitute unlawful or objectionable conduct.

The Respondent has a history of giving January wage increases. Overbeck would annually do a wage survey of area rates. He also used Chamber of Commerce wage data to determine the next year's pay scale. This information was used in conjunction with his assessment of the Respondent's financial condition to determine the final amount to be awarded.

Overbeck testified that the Respondent had been faced with a large turnover in employees, partially due to the wage structure at the plant not being competitive. In 1994 an across-the-board raise of 13 cents was granted to employees.[5] The Respondent explained the 1995 raise of 47 cents was necessitated by the company's need to remain competitive in the local area. Additionally, employees hired by the Respondent through temporary agencies were being paid $5 per hour. The Respondent's starting rate at the time was $4.53 per hour. In about August 1994, it was determined that the plant would need about 50 additional full-time employees due to an expansion program.

The Union filed its petition for election on November 12, 1994. Overbeck testified that he began planning for the 1995 budget in August or September and on October 19, 1994, he met with a Chamber of Commerce representative about its wage survey. Overbeck states he decided in October or November to initiate the 47-cent 1995 wage increase.

Employee Connie Neely testified concerning a meeting Respondent held with employees shortly before the January 12 election. In this meeting Respondent's General Manager Holderer was asked when employees would be getting a pay raise. Holderer replied she could not afford to give anyone a pay increase because the Respondent had just built a new warehouse. Neely's testimony was not controverted by the Respondent. Former employee Alice Sullivan-Young testified that she was told at some unspecified time by Holderer or Overbeck that the employees would not get pay increases. Sullivan-Young's testimony likewise was uncontroverted.

B. *Analysis of the Pay Raise Issue*

Granting pay raises shortly before representation elections is a delicate matter which may improperly influence voters. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). The Board analyzes such wage increases by looking at several factors including: (1) timing in relation to the election; (2) the amount of the increase relative to the asserted reason for the raise; (3) whether the raise was excessive when measured historically; (4) the number of employees receiving the raise; (5) how employees reasonably view the purpose of the raise; and (6) whether the raise was needed to stay competitive. *Wis-Pak Foods*, 319 NLRB 933 (1995); *B & D Plastics*, 302 NLRB 245 (1991); *Town & Country Supermarkets*, 244 NLRB 303, 309 (1979), enfd. 666 F.2d 1294 (10th Cir. 1981).

The announcement of the raise in this case was made a few days prior to the election. The employees were notified of the amount and the fact that it would be retroactive to January 1. The timing was consistent with Respondent's past grant of wage raises in January, and was given to all employees.

Respondent's asserted reason for granting a raise was to stay competitive with area wage rates, stop turnover of workers, and to attract permanent workers for its expansion. The amount of the raise was significant compared to past practice—approximately 3-1/2 times the 1994 raise.

A troubling aspect of the raise is the uncontroverted testimony that employees were told during the organizational campaign that raises could not be afforded or promised at that time. Yet shortly before the election came the announcement that they would receive a raise 3-1/2 times that given the year before. The timing of Respondent's statements that it could not afford raises conflicts substantially with Overbeck's testimony that he made the decision to grant the raises in October or November. This was in close proximity to the November 12 filing of the election petition. The Respondent did not explain how Overbeck's alleged wage increase decision had been finalized and yet employees were told that raises could not be afforded or promised. The granting of the increase after saying it would not happen would reasonably have an important impact on how employees viewed the purpose of the raise. *Holly Farms Corp.*, 311 NLRB 273, 274 (1993); Compare, *ARA Services*, 274 NLRB 348 (1985).

Considering the record as a whole, I find that the Respondent's granting of a generous across-the-board raise immediately preceding the election was designed to influence the employees' voting in the election. The grant of the preelection raise violated Section 8(a)(1) of the Act.

VI. DISCIPLINE OF ALICE SULLIVAN YOUNG

The Government contends former employee Alice Sullivan Young (Sullivan) discriminatorily received a disciplinary warning for a December absence. The Respondent asserts Sullivan was given the warning in accordance with company policy.

Sullivan was a union supporter and served as the Union's election observer. There is evidence that her supervisor knew of the activity and asked if she had done anything to offend Sullivan.

In December 1994 the Respondent had a policy that voluntary overtime work was solicited from employees but it was considered regular work for counting of absences. Thus if an employee missed a voluntary overtime day they could be disciplined. Alice Sullivan volunteered for overtime on Saturday, December 3 but missed work that day. Supervisor Virgie McKenzie, told Sullivan that she would be disciplined for the absence. Sullivan ultimately, after the January election, did receive a warning notice for the missed day.

Employees Sheila Malone and Connie Neely who allegedly missed the same day were not disciplined. The Respondent's records did not show that Neely was scheduled to work December 3 or that she was absent on that day. Respondent's policy was to give a warning to an employee after six absences. Malone had not exceeded the 6 unexcused absences in a 12-month period at that time. Sullivan had exceeded six absences with her December 3 missed workday.

I conclude that the Government has not proved by a preponderance of the evidence that Sullivan was treated in an unlawful manner when she received the absence warning. I find that the Respondent did not violate Section 8(a)(1) and

[5] The Respondent changed its job classifications starting in 1993. These remained consistent through January 1995.

(3) of the Act by giving Sullivan a written discipline for her December 3 absence.

VII. TERMINATION OF LOMAS WEST

Avernor Lomas West was hired by the Respondent in May 1985. In May 1992 he was promoted to the position of Group Leader of Shop Manufacturing Area and Maintenance. West asserts that because of his dissatisfaction with the job he resigned as leader in a letter of resignation dated June 28, 1993. The letter of resignation was signed by Production Manager Gene Targonski. Targonski testified that he did not recall the document but did believe that a dispute West had over his leader duties had been resolved without West resigning that position. West's pay was not reduced when he allegedly resigned his supervisory duties.

West was laid off August 2 due to a restructuring of the Company. The restructuring eliminated approximately 10 leader positions. The Government contends West was an employee at the time of his discharge and that he was terminated by the Respondent because of his union activities.

A. *Union Activities*

West engaged in some union activities during the organizational campaign. He got five to seven union authorization cards signed by fellow employees. He did not attend any union meetings. The Respondent denies it had any knowledge of West's union activities.

B. *Concerted Activities*

Evidence was also presented of West's concerted activities at the plant. West testified that in approximately November 1994 he complained to supervisor Gene Targonski about noise problems on the production floor. He had spoken to fellow employee James Allison about the matter and was complaining for both of them. West wanted the Respondent to pay for a hearing test. Targonski did not recall West complaining about the noise or employees' hearing problems. The Respondent did provide employees with ear protection. West states that the last time he mentioned the problem was around July 4, 1995. It is concluded that West's complaints about his hearing were not the motivation for his discharge.

C. *Supervisory/Lead Duties*

Targonski testified that West never stopped performing his group leader duties. As a group leader, West's duties included signing time cards to verify employee's attendance. He also filled out employee performance reviews and gave them to Targonski for final action. West ran the plant's presses and repaired breakdowns of equipment in the production area. He could not hire or fire employees but could recommend employment actions. West testified that his recommendations were ignored. Targonski stated that West could recommend discipline but would not have the authority to deal directly with the problem. Following West's recommendation, Targonski did talk to one employee about a problem that West had called to his attention. Targonski counseled the employee and checked with West later to see if the problem had abated.

After his letter of resignation in 1993 West continued signing time cards. West worked the first shift. He would initial cards for both the first and second shifts. West stopped this practice when supervisor Norman Luna was hired in June of 1995. West continued to do ratings on performance appraisals at the direction of Targonski. He would recommend pay increases on occasion but West testified Targonski did not follow those recommendations. West did not recall performing any such appraisals in 1995.

At the time of his August 1995 termination West continued to repair equipment and run parts on the presses. He would also communicate with second-shift press operator Jim Allison about production runs. Allison testified that he considered West his supervisor. West testified that if Allison had problems on the presses he would call him at home for guidance on correcting the problem.

The record supports the conclusion that the Respondent considered West to be a lead person. Respondent's unrebutted documentation shows West carried the title of shop group leader when he was appraised in 1994. West continued to sign time cards until Luna was hired. He gave his opinions for employee evaluations. West aided Allison with any problems and would criticize his work.

I find that West was not a supervisor within the meaning of the Act. His actual duties did not exceed dealing with routine matters. It is also noted that the Respondent listed him on the *Excelsior* voting list as an employee eligible to vote in the election. West did vote without challenge in the election. However, it is concluded that West's duties and the title he was given classify him as a group leader. I find that the Respondent did view West as a leader at the time of his discharge.

D. *Respondent's Employee Meetings*

Employer held group meetings prior to the January 12 election. Managers Targonski, Overbeck, and Holderer conducted these gatherings in Holderer's office. West recalled at the last such meeting he attended the subject of union stewards was discussed. Targonski spoke of when he worked as a union member in another plant. West testified that Targonski made a statement to the effect that the steward could be the employee's worst enemy. West responded that stewards would be chosen by the people in the employee's work area. West recalled that the three managers got very upset by his comments. As a result he did not say anything for the rest of the meeting.

After the meeting was over West testified that he was the last employee to leave. Targonski was exiting immediately behind him. West recalled that Targonski said, "We know all about you." West stopped and turned around. Overbeck and Holderer were present also, and West testified they both repeated, "Yes, we know all about you." West states he replied that it did not matter to him.

The Three managers denied that West ever made the remarks he testified to about stewards. In sum, they could not recall his active participation in any of the meetings. They all denied any angry reaction to West as well as the remarks attributed to them by West.

E. *Respondent's Meeting about Layoffs and West's Discharge*

On about July 25 the Respondent laid off the table leaders. Shortly thereafter the Respondent's managers met with their production area employees. The managers assured the em-

ployees that no hourly paid workers would be laid off and the reorganization only effected management. The employees were told the reorganization was mandated by the need to reduce costs because of the construction expenses associated with building a new warehouse.

West testified that on August 2 he was called into the office where Overbeck and Targonski were waiting for him. Overbeck told him that he was being laid off because of a reorganization of management. West protested that he was not part of management. Overbeck said he would check into it. West was never rehired.

F. *Analysis of West's Discharge*

The General Counsel has the initial burden of establishing a prima facie case. This must be sufficient to support an inference that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support a prima facie showing of discriminatory motivation under Section 8(a)(3) are union activity, employer knowledge, timing, and employer animus. Once such prima facie unlawful motivation is shown, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. sub nom. 705 F.2d 799 (6th Cir. 1982); *T & J Trucking Co.*, 316 NLRB 771 (1995).

West did engage in union activity, including having fellow employees sign union authorization cards. There is no direct evidence that the Respondent knew of West's card signing efforts. The Respondent denied knowledge of his union activities or sympathies. Targonski testified that he considered West a supporter of the Company because he recalled West voicing the opinion that a union was not needed.

An important event in inferring Respondent's knowledge of West's union sympathies is the meeting where West asserts that he stated his opinion about union stewards. West's demeanor when testifying about this event seemed sincere. Likewise the denials of managers Holderer, Targonski, and Overbeck that West ever spoke up gave no hint of untruthfulness. They all denied saying to West that they knew "about" him.

West could not name the other employees who were present when he allegedly spoke up in the meeting and received the anguished reaction from the managers. No employees who were present at the meeting were called to testify by either party. I draw no adverse inference from the fact such employee witnesses were not called to testify. It cannot be presumed they would be favorable to either party. *Salisbury Hotel*, 283 NLRB 685, 691 fn. 10 (1987). However, I do take this fact into consideration in assessing whether the Government has met its burden of proving its case by the required preponderance of the evidence. *Queen of the Valley Hospital*, 316 NLRB 721 fn. 1 (1995). Weighing the evidence as a whole I find that the comments about stewards and the alleged angry response from management did not occur.

With regard to animus it is clear that the Respondent opposed the Union's organizational campaign. The Respondent's interrogation of employees and preelection pay raise have been found to be violations of the Act and are evidence of animus.

The timing of West's discharge is not favorable to his case. The August termination is remote in time from the January election and his union activities which preceded the election. The Respondent was concededly reducing its work force when West was terminated. Approximately nine other lead employees were terminated at the time West was discharged. West's discharge is the only one that is alleged to have violated the Act.

Based on the record as a whole, the Government has not sustained its burden of showing by a preponderance of the evidence that West's discharge was motivated by his protected concerted activities. I find that the Respondent did not violate Section 8(a)(1) and (3) of the Act when it terminated the employment of Lomas West.

VIII. OBJECTIONS TO ELECTION

There are two objections which the Acting Regional Director's Report set for hearing: (1) the granting of the preelection wage increase and, (2) allowing the General Manager's babysitter to vote in the election even though she did not work at the plant.

A. *The Wage Increase*

As noted above, the January general wage increase has been found to be violative of the Act. I find that this action was also objectionable conduct necessitating the setting aside of the January 12 election.

B. *The Babysitter's Vote*

The Union alleged that the Respondent included the name of employee Carolyn Chandler on the *Excelsior* voting list even though it knew she did not perform unit work. The Union alleges this act as substantial objectionable conduct requiring the election be overturned.

The Respondent concedes that Carolyn Chandler was hired December 8 to serve as a replacement to a babysitter/housekeeper for the Respondent's general manager, Heike Holderer. The Respondent asserts that the employee Chandler replaced worked both at Holderer's home and at the plant. The Respondent further asserts that the same employment was contemplated for Chandler. However, it is undisputed that Chandler has done no work at the plant since being hired. Chandler's name was included on the *Excelsior* voter eligibility list. The Respondent mentioned her job to the Union during the preelection conference. Chandler voted in the election without challenge.

I find that there is insufficient evidence to conclude that the placement of Chandler's name on the list was objectionable conduct. The Respondent won the election by a vote of 37 to 30. There were no void ballots and one challenged ballot. It is further found that Chandler's ballot would not have

been determinative of the results of the election. *Fulton Building*, 293 NLRB 778 fn. 1 (1989).

CONCLUSIONS OF LAW

1. Lampi, L.L.C. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local 558, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Maintaining a rule against employees discussing their pay with fellow employees.

(b) Interrogating employees about employees' union sympathies and activities;

(c) Granting wage increases to influence employees' votes in a representation election.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The conduct described in paragraph 3(c) above also constitutes objectionable conduct affecting the results of the representation election held in Case 10–RC–14568 on January 12, 1995.

6. Respondent has not violated the Act except as herein specified.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In addition, having found that the Respondent engaged in objectionable conduct affecting the results of the election in Case 10–RC–14568, I shall recommend that the election held in that case on January 12, 1995, be set aside, that a new election be held at a time to be established in the discretion of the Regional Director, and that the Regional Director include in the notice of election the following *Lufkin Rule*[6] language:

NOTICE TO ALL VOTERS

The election of January 12, 1995, was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' exercise of a free and reasoned choice. Therefore a new election will be held in accordance with the terms of this Notice of Election. All eligible voters should understand that the National Labor Relations Act gives them the right to cast their ballots as they see fit, and protects them in the exercise of this right, free from interference by any of the parties.

[6] *Lufkin Rule Co.*, 147 NLRB 341 (1964).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Lampi, L.L.C., Huntsville, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a rule that employees may not discuss their pay with fellow employees.

(b) Interrogating employees about employees' union sympathies and activities.

(c) Granting wage increases to influence employees' votes in a representation election.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Revoke the Respondent's rule against employees discussing their pay with each other.

(b) Within 14 days after service by the Region, post at its facility in Huntsville, Alabama, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 10 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 19, 1995.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election conducted in Case 10–RC–14568 on January 12, 1995, be set aside, and that a new election be held at such time and under such circumstances as the Regional Director shall deem appropriate.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees about our employees' union sympathies or activities.

WE WILL NOT maintain a rule that employees may not discuss their pay with fellow employees.

WE WILL NOT grant employees preelection wage increases in order to influence their votes in a representation election.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL revoke our rule against employees discussing their pay with each other.

LAMPI, L.L.C.